SUPREME COURT, U.S.
FILED
OCT 28 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 588 [redacted]

HENRY MONROE,

Petitioner,

versus

THE UNITED STATES OF AMERICA,

Respondent.

[redacted] Petition for Writ of Certiorari.

SMITH & WALTZER
Benjamin E. Smith
Counsel for Petitioner

American Printing Co., Inc., 424 Camp Street

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. _____, Misc.

HENRY MONROE,

Petitioner,

versus

THE UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully moves this Court for leave to file the petition for writ of certiorari hereto annexed, under Sections 1251 and 1651 of Title 28 of The United States Code, directed to the United States Court of Appeals of the Fifth Circuit and the Honorable Judges of that Court.

SMITH & WALTZER
Benjamin E. Smith
Counsel for Petitioner

INDEX

		Page
1.)	Motion for Leave to file Petition for Writ of Certiorari	1
2.)	Petition for Writ of Certiorari	3
3.)	Appendix	21

INDEX OF CASES

1. Agnello vs. U. S., 269 U. S. 20, 30, 46, S. Ct. 4, 5, 70 L. Ed 145.
2. U. S. vs. Rabinowitz, 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 653.
3. Trupiano vs. U. S., 334, U. S. 699, 68 S. Ct. 1229 L. Ed. 1663.
4. U. S. vs. Kind, 87 F. 2d. 315.
5. U. S. vs. Di Pie, 332, U. S. 581, 68 S. Ct. 222, 92, L. Ed. 210.
6. Johnson vs. U. S., 333 U. S. 10, 68 Ct. 367, 92 L. Ed. 436.
7. McDonald vs. U. S., 335 U. S. 451, 69, S. Ct. 191.
8. Maki vs. State, 18 Wyo. 481, 112 P. 334, 33 LRA (N. S.) 465, Am. Jr. 435 (Evid. Sec. 505).
9. Mack vs. State, 203 Ind. 355, 180, N. W. 279, 83 ALR 1349.
10. Raffel vs. U. S., 271 U. S. 494, 46 S. Ct. 566, 70 L. Ed. 1054.
11. U. S. vs. Smith, 283 F. 2d. 760.
12. Spaulding vs. U. S., 279 F. 2d 65.
13. Tandberg-Hansen vs. U. S., 284 F. 2d 231.
14. Weiss vs. U. S., 192 F. 2d 675.
15. Fowler vs. U. S., 239 F. 2d 93.
16. Jones vs. U. S., (1960) 302 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No._____, Misc.

HENRY MONROE,

Petitioner,

versus

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review an opinion of that Court entered July 18th, 1963, (rehearing denied August 29th, 1963) which affirmed applicant's conviction in the United States District Court Eastern District of Louisiana, New Orleans Division, Honorable Rob-

ert Ainsworth, Judge. A certified copy of all proceedings in the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals, Fifth Circuit is filed herewith in accordance with Rule 31, par. 20 of the Rules of this Court.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana on the motion to suppress is reported at 205 Fed. Sup. 175 (1962) and the opinion of the United States Court of Appeal for the Fifth Circuit affirming that and the conviction appears at 320, Fed. 2d 277. (1963) (GA 5th).

JURISDICTION TO REVIEW

The jurisdiction of this Court invoked under Sections 1254(1) and 1651(a) of Title 28, United States Code.

This Court has jurisdiction thereby to review convictions under the Narcotic Import Act. (21 U.S. C. 174) and the Harrison Narcotic Act, (26 U.S. C. 4724) and to entertain questions of Federal Due Process under the fifth Amendment and Unreasonable Searches and Seizures under the fourth Amendment to the United States Constitution.

The claim of this applicant to have been denied a fair trial and to have been convicted on evidence produced as the result of an unreasonable search and seizure warrant this Court exercising its right to review. These claims are set

forth below under the heading, "Reasons for Granting the Writ."

The applicant Henry Monroe was arrested and charged with a violation of 21 U.S.C. 174, 26 U.S.C. 4724, relative to the Narcotic Drug Import Act and the Harrison Narcotic Act by Federal Narcotics Agents as the result of a tip from an unnamed informant. At the trial, approximately 1700 capsules of hreoin were admitted into evidence despite defendant's motion that this evidence obtained during arrest without probable cause and without an arrest or search warrant be suppressed as being obtained in violation of the fourth, fifth and fourteenth Amendments to the United States Constitution. The District Coutr denied the motion and upon trial applicant was convicted by the jury. The Court of Appeals affirmed and applicant now moves for this writ. The questions presented are:

1) Whether evidence obtained at the time or arrest should have been suppressed as the product of an unreasonable search and seizure.

2) Whether Trial Court should have allowed evidence of defendant's past criminal record to be presented to the jury when the defendant's credibility was not at issue and the defendant did not testify in his own behalf before the jury.

3) Whether the Trial Court should have allowed into the record before the jury, hearsay testimony originating from an unnamed informant which testimony contained an imputation as to the defendant's guilt when:

   a) Said hearsay was obstensibly designed to establish probable cause for the arrest where such issue was not before the jury, and

b) When defendant then sought the name of such informant for purposes of cross examination and said request was denied by the Trial Court.

4) Whether the defendant's culpable admissions made under oath at the hearing on the motion to suppress and out of the presence of the jury, which admissions had the effect of a judicial confession of guilt, have been ruled irrelevant and excluded from the record.

5) Whether the Trial Judge should have excluded the above described judicial confession from presentation of the jury and also should have ruled same irrelevant when received over counsel's objections on the motion to suppress evidence, where no predicate was laid for its taking or introduction into evidence, and no warning given as to its consequences.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED.

CONSTITUTIONAL AMENDMENT IV — SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CONSTITUTIONAL AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY, SELF INCRIMINATION, DUE PROCESS, JUST COMPENSATION FOR PROPERTY.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment, or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the militia, when in armed service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTIONAL AMENDMENT XIV — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT.

Section I All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section II The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATUTES

1.) 26 USCA 7607

2.) 26 USCA 7237

3.) 21 USCA 174

4.) 26 USCA 4724

See Appendix A

STATEMENT

Defendant was indicted, tried and convicted on two counts of a three count indictment, charging a violation of 21 U.S.C. 174 (the Narcotic Import Act) and 26 U.S.C. 4724 (the Harrison Narcotic Act) relative to the transportation and possession of a narcotic drug, to wit, 1764 capsules of heroin. Appellant was additionally charged as a multiple offender under 26 U.S.C. 7237 and sentenced thereunder. The basic facts are as follows: Defendant. Henry Monroe was arrested and 1764 capsules of heroin taken from his person on September 18th, 1962, in the Union Passenger Terminal at New Orleans when he was alighting from the train from Chicago by four agents of the Federal Bureau of Narcotics, pursuant to a tip by an unnamed informant that Monroe was engaged in transporting narcotics from Chicago to New Orleans.

Prior to the trial the defndant filed a motion to suppress the introduction into evidence of the heroin capsules which were obtained without an arrest or search warrant and without probable cause.[1] On April 23, 1962, United

[1] R. page 6 and 7.

States District Judge Robert R. Ainsworth denied this motion[2] holding that there was probably cause or reasonable grounds to believe the person had or was committing a violation of the Narcotics Act and thus permit arrest and search without a warrant, 26 U.S.C. 7607 (2).

Prior to the ruling on the motion a hearing was held on March 14, 1962, at which time defendant made culpable admissions under oath and out of the presence of the jury, which admissions were received over counsel's objections on the motion to suppress evidence where no predicate was laid for the taking or introduction into evidence and no warning given as to its consequences. At the trial the jury was exposed to the defendant's culpable admissions amounting to a confession made at the hearing on the motion to suppress.[3] Monroe admitted that he had a package of stolen heroin and that he was going to sell it if he could.

The appellant did not assume the witness stand before the jury in his own behalf, thus his credibility was not at issue. He did testify before the Judge alone at the hearing on the motion to suppress evidence.[4] At that time he was asked concerning his prior arrests and convictions. This evidence was placed before the jury even though the accused did not testify on his own behalf before that jury and his intent was not an issue in the case. At the trial, Officer Warner testifies, "We had reliable information that Henry Monroe was arriving here during that period with some narcotics." Defendant's counsel asked to be given the name of the informer. This request was refused b ythe Trial

---

[2]R. page 14 thru 18.
[3]R. pages 141 thru 148.
[4]R. pages 130 thru 139.

Court. This hearsay evidence was admitted in the presence of the jury when the question of probable causes for the arrest was not before the jury.[5] The Judge had just before this hearsay testimony upheld an objection to any discussion of warrants bearing on the arrest and in effect had foreclosed any attack in the presence of the jury on the question of probable cause for the arrest.

REASONS FOR GRANTING THE WRIT

The reasons below should be reviewed because defendant's Constitutionally guaranteed rights under Amendments IV, V and XIV to the United States Constitution have been violated.

1) The Federal Narcotics Agents had Henry Monroe under surveillance for more than sixty days. While these agents did not know positively when or if Monroe would arrive in New Orleans, they did intend to arrest and search him when he did. The uncertainty as to his arrival might be said to justify absence of an arrest warrant, but it is not an excuse for the failure to obtain a search warrant.

Appellant's motion to suppress was based on the premise that under these circumstances a warrant should have been obtained. A reasonable search may follow a valid arrest based upon a warrant or probable cause.[6] Probable cause is a substitute for an arrest warrant and search pursuant to the arrest, it is only justifiable where it is not practical to obtain the search warrant. The Trial Judge

---

[5]R. page 79.
[6]*Agnello vs. U. S.*, 269 U.S. 20, 30, 46 S. Ct. 4, 5, 70 L. Ed. 145.

held that the *Rabinowitz* case[7] is authority that search warrant need not have been produced in this action. The rule in *Rabinowitz* did not eliminate the practicability test in *Trupiano*,[8] but only provided an additional test of reasonableness of the search is also relevant where it applies.

In the instant case the reasonableness test is not applicable since the search was of the person. Thus the issue is whether or not it was practicable to obtain a warrant.

For the search warrant, which is an old and valued shield to individual liberty, to have a continuing meaning in modern life it is suggested that this Court should reaffirm the doctrine of requiring production of a search warrant when it is practical to do so. The Court would be following that long line of cases which gave real meaning to the idea that personal search should ordinarily be under warrant and only on an emergency otherwise.[9]

2) The jury was exposed to defndant's culpable admissions made at a prior hearing on the motion to suppress.[10] The purpose of the hearing was not to inquire into his guilt or innocence but to discuss the foundation for the arrest and subsequent seizure. Monroe admitted having a package of stolen heroin and that he intended to sell it without being informed that what he said may be used against him. The facts would have been relevant had they been obtained when and if he had testified before the jury and a proper foundation as to the free and voluntary character of these

[7]U. S. vs. Rabinowitz, 339 U.S. 56, 70 S. Ct. 430, 94 L. Ed. 653.
[8]Trupiano vs. U. S., 334 U.S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663.
[9]*U. S. vs. Kind*, 87 F. 2d 315, *U. S. vs. Di Pe*, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210, *Johnson vs. U. S.*, 333 US. 10, 68 S. Ct. 367, 92 L. Ed. 436, *McDonald vs. U. S.*, 335 U.S. 451, 69, S. Ct 191.
[10]R. pages 141 thru 148.

confessions been laid before they were taken and before they were introduced to the jury.

None of the standards were met. The confession was irrelevant to the issue of the motion to suppress and should not have been received into evidence without the fulfillment of the proper safeguards. An objection properly directed to this irrelevancy was overruled.[11]

Judicial confessions amounting to a confession are received only when the accused is a witness in his own behalf.[12] A confession must be voluntary and it is not voluntary unless the accused was previously informed that he is not compelled to incriminate himself and that any confession may be used against him.[13]

The failure to warn also relates to the predicates of the confession. The Trial Jury was aware that the confession was irrelevant when made and given in absence of the Traditional Warning. The jury was totally unaware of the facst leading up to the confession. The accused was entitled to take the witness stand before the jury to rebut the alleged voluntary character of the statement.[14] This righ was never made available to him either before or after the confession was read to the jury.

Fowler vs. U.S., 239 F.2d 93, allowed an admission of ownership made in a motion to suppres to be received in evidence. However, the cases cited in *Fowler* all turn on use of relevant evidence not amount to a confession re-

[11] R. pages 148 and 149.
[12] 20 Am. Jur. 450 (End. Sec. 527).
[13] *Maki vs. State*, 18 Wyo. 481, 112 P. 334, 33 LRA (N.S.) 465, Am. Jr. 435 (Evid. Sec. 505).
[14] *Mack vs. State*, 203 Ind. 355, 180 N. W. 279, 83 ALR 1349.

quired by law to show standing. In this case the accused was not required to show standing and questions concerning the capsules were all irrelevant. Had the admission or confession been used in rebuttal or for impeachment purposes when the accused took the stand before the jury to defend himself against the charge in chief, then no predicates would have been necessary,[15] but such was not the case here.

3) The appellant did not assume the witness stand thus his credibility was not at issue. Prior to the trial at the hearing on the motion to suppress evidence he was asked concerning his prior arrests and conviction.[16] The questions while proper at that time to show the circumstances of his arrest and in an effort to suppress evidence gained thereby, his credibility could be tested by such questioning, his narcotic record should not be used to simply confirm the officer's knowledge of him upon which they based their probable cause for the arrest since the question of probable cause was not posed by the motion, the sole issue being the practicability of obtaining a warrant of search. In any event under no circumstances should this evidence have been placed before the jury when the accused did not testify on his own behalf before the jury and his intent was not an issue.[17] The only possible effect it could have on the jury was to prejudice them against the accused.

4) Officer Warner testified to the effect that the agents had reliable information that Monroe was arriving here

---

[15] *Raffel vs. U. S.*, 271 U.S. 494, 46 S. Ct. 566, 70 L. Ed. 1054.
[16] R. pages 138 and 139.
[17] *U. S. vs. Smith*, 283 F. 2d 760; *Spaulding vs. U. S.*, 279 F. 2d 65; Tandberg-Hanssen vs. U. S., 284 F. 2d 231; Weiss vs. U. S., 192 F. 2d 675.

with narcotics. Appellant's request for the name of the informer was refused by the Trial Court.[18] *Bruner vs. U. S.*[19] cited by the Trial Judge in his refusal is inapplicable since in that case the defendant was violating the law when arrested. Here to all objective observation prior to arrest, the accused had done nothing unlawful, assuming Arguendo that probable cause was at issue, the entire concept of probable cause rested on the reliability of the informer who should have been subject to cross examination. This testimony was hearsay and for that reason inadmissible.

In *U. S. vs. Mont*, 306 F.2d 412, the Judge instructed the jury that hearsay evidence can only be considered as to the question of agent's reasonable belief that defendant was committing a crime and not whether defndant actually had possession of narcotics. This hearsay evidence was admitted in the presence of the jury when the question of probable cause for the arrest was not before the jury. The Judge had just before this hearsay was given[20] upheld an objection to any discussion of warrants bearing on the arrest and in effect had foreclosed any attack in the presence of the jury on the question of probable cause for the arrest. The only effect of the testimony as received was to bear on the question whether the defndant had possession of narcotics.

The comment of the *Mont* case, consistent with the long line of hearsay cases on the point, was that ". . . the Judge should nevertheless have excluded hearsay that was so obviously detrimental." In *Mont*, as was not done in this

---

[18]R. page 82 and Supp. R. page 37.
[19]Bruner vs. U. S., 239 F. 2d 621.
[20]R. page 79.

case, the Trial Court gave an immediate instruction to the jury as to the legal basis upon which the evidence could have been considered by them. The absence of such a charge in this record, we submit, is error.

It might be argued that since appellant's counsel below asked the question which elicited the hearsay that he opened the door to the answer, but contrary to that situation in *Mont*[21] here appellant's counsel asked a perfectly simple quetsion which could have been adequately answered by simply saying, for example:

> A. "We had reliable information (or we believed) that Henry Monroe was arriving here during that period."

Had the agent left it at that the only question that would have been raised by the answer would have been the identity of the informant and his reliability, *had the issue of probable cause been before the jury.* Since it was not, the answer as suggestde above would have been harmless. Since the officer exceeded that comment by interjecting prejudicial information before the jury this was error.

4) One of the salient features of the case is the exposure to the jury of the defendant's culpable admissions amounting to a confession made at the time of the hearing on the motion to suppress. The purpose of that hearing was to discuss the foundation for the arrest and subsequent seizure and not to inquire into the guilt or innocence of the

[21] In Mont defendant counsel persisted after warnings by the Trial Judge, in inquiring as to the nature of the information in an effort to show entrapment. Such was not the case here.

accused. Apellant's counsel confined himself to those issues but the government was not quite so careful to do so. In fact, though entirely irrelevant to the hearing, the United States Attorney obtained admissions from Monroe that he had given an incomplete if not a false name;[22] that he had a package of stolen heroin[23] and that he was going to sell it if he could.[24]

All of these facts would be perfectly relevant and socially useful in appellant's conviction had: 1) they been obtained from the defendant when and if he had testified before the jury, and 2) had a proper foundation been laid before they were taken and before they were introduced to the jury.

The taking and admission of confession evidence is circumscribed with well known rules of law and among these are that not only must the confessor know that what he says may be used against him, but that the free and voluntary character of the confession must be established both out of and in the presence of the jury before it can be admitted into evidence.

In this case none of these standards are met. In the First instance the confession, while relevant to the guilt or innocence of the accused, was irrelevant to the issues of the motion to suppress, and should not have been received into evidence without certain safeguards having been met. The record reflects an objection that was probably directed toward this irrelevancy[25] but the objection was overruled.

---

[22]R. page 141.
[23]R. page 142.
[24]R. page 148.
[25]R. page 148 and 149. The general cases on relevancy are cited in

Had appellant's counsel below been aware that such damaging testimony was to be used before the jury, the objection would have been more vigorous and to the point.

Historically, judicial admissions amounting to a confession were excluded as evidence[26] and only when the accused is a witness in his own behalf are they received today.[27] "The general rule, however, is that a confession is not voluntary unless the accused was previously informed that he is not compelled to incriminate himself and that any confession received may be used against him."[28] This is particularly true when the confession is a judicial one as in this case. Had appellant or his counsel below been aware that an attempt would be made to use the evidence taken on the motion to suppress as a confession to be read to the jury, then the entire character of that hearing would have been altered. While present counsel does not say, as some others might, that the method of introduction of the confession was in effect a trick on the defendant, certainly he should have been warned in advance that what he might say could be used against him.

The failure to warn also relates to the predicates of the confession. Had the judge given the required caveat then the voluntary character of the statements would have

---

footnotes 6, 7 and 8 to evidence Section 246 on page 239 of Vol. 20 of Am. Jur. following the statement that: "Irrelevant facts and circumstances — that is, those which do not throw any light upon, or have any logical relation to, the facts at issue which must be established by one party or disproved by the other . . . must be excluded." The fact of possession admitted to by the appellant could not be relevant to the issue of an illegal search and seizure. Virtue is not its own reward in law as the *In Re* case (Note—Supra) holds: ". . . a search is not to be made legal by what it turns up . . ."

[26] 18 LRA (N.S.) 872, S. 50 LRA (N.S.) 1077.

[27] 20 Am. Jur. 450 (End. Sec. 527).

[28] *Maki vs. State*, 18 Wyo. 481, 112 P. 334, 33 LRA (N.S.) 465, Am. Jur. 435 (Evid. Sec. 505).

been established, but no such warning was ever given. On the contrary, all the accused had to rely upon was an opening remark of his own lawyer that:

> "As you know, Henry, we are here today before the Court on a motion to suppress evidence in this particular case."[29]

Not only was the Trial Judge aware of the circumstances under which the confession was taken, i.e., that it was irrelevant when made and given in the absence of the Traditional warning, but the jury was Totally unaware of the facts leading up to the confession. Finally, the accused was entitled to take the witness stand before the jury to rebut, if he could, the alleged voluntary character of the statement.[30] This right was never made available to him either before or after the confession was read to the jury.

The case of *Fowler vs. U. S.*, 239 F.2d 93, allowed an admission of ownership made in a motion to suppress to be received in evidence. In that case, the old rule of Rule 41(e) F. R. Crim. P. was still in effect, unmodified by *Jones vs. U. S.*, (1960) 302 U.S. 257, 80 S. Ct. 725.4 L. Ed. 2d 697[31] and the motion as required by law admitted ownership of the seized alcohol and it and accompanying testimony was admitted into evidence. However, the cases cited in *Fowler* all turn on the use of relevant evidence, not

---

[29]R. page 130, line 13.

[30]*Mack vs. State*, 203 Ind. 355, 180 N. W. 279, 83 ALR 1349.

[31]Previous to this case the rule was that to have standing to move to suppress, th emover must show ownership or possession. See *Steeber vs. U. S.*, 109 F. 2d 615, 33 ALR 2d 1425. The new rule was applied in this circuit in *Bourg vs. U. S.*, 286 F. 2d 124 (1960).

amounting to a confession, procured as a written admission as required by law to show standing. Because of the standing rule the evidence was relevant, however, in this case the accused was not required to show standing and the questions about his knowledge of the capsules, that they were stolen, that he wanted to sell them and that they were in his possession, were all irrelevant and amounted to a confession the accused gave while unaware of what he was doing.

Had the admissions or confession been used in rebuttal or for impeachment purposes when the accused took the stand before the jury to defend himself against the charge in chief, then no predicates would have been necessary,[32] but such was not the case here.

In conclusion, not only were the statements taken from appellant on the motion to suppress admissions against interest, they were a judicial confession that far exceeded the issues of the case. To allow this type of confession evidence to enter the jury record in the absence of the defendant on the stand and warnings as to the consequences of his remarks is to rewrite the admissibility rules of confession evidence. It is submitted that the confession evidence was inadmissable as irrelevant and without proper foundation.

CONCLUSION

For the reasons set forth above, it is respectfully sub-

[32]See *Raffel vs. U. S.*, 271 U.S. 494, 46 S. Ct. 566, 70 L. Ed. 1054.

mitted that the Petition for a writ of certiorari should be granted.

SMITH & WALTZER
Benjamin E. Smith
Attorney for Petitioner
1006 Baronne Building
New Orleans, Louisiana

CERTIFICATE

I certify that a copy of the foregoing application has been served upon the United States Attorney and the Attorney General by placing same in the United States mail, properly addressed with adequate postage affixed thereto.

Benjamin E. Smith

APPENDIX A

1.) 26 USCA 7607. ADDITIONAL AUTHORITY FOR BUREAU OR NARCOTICS AND BUREAU OF CUSTOMS

The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401 (1) of the Tariff Act of 1930, as amended; 19 U.S.C., sec. 1401 (1), may —

(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

Added July 18, 1956, c. 629, Title I § 104 (a), 70 Stat. 570.

2.) 26 USCA 7237. VIOLATION OF LAWS RELATING TO NARCOTIC DRUGS AND TO MARIHUANA

(a) Violation of law relating to opium and coca leaves and marihuana. - - Whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than

10 years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than 10 or more than 20 years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subsection, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subsection or in section 2 (c) of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C. 174), or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the act of December 17, 1914 (38 Stat. 789), as amended; section 1, chapter 202, of the act of May 26, 1922 (42 Stat. 596), as amended; section 12, chapter 553, of the act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557 (b) (1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges

that he is such person, he shall be sentenced as prescribed in this subsection.

(b) Unlawful disclosure of information on returns or order forms. - - Any person who shall disclose the information contained in the statements or returns required under section 4732 (b) or in the duplicate order forms required in section 4705 (e), except as expressly provided in section 4773, and except for the purpose of enforcing the provisions of part I of subchapter A of chapter 39, or for the purpose of enforcing any law of any State or Territory or the District of Columbia, or any insular possession of the United States, or ordinance of any organized municipality therein, regulating the sale, prescribing, dispensing, dealing in, or distribution of narcotic drugs, shall, on conviction, be fined or imprisoned as provided by subsection (a) of this section. August 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 860, amended January 20, 1955, c. 1, 69 Stat. 3. 21 USCA 174. SAME; PENALTY; EVIDENCE.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than

forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

26 USCA 4724. UNLAWFUL ACTS IN CASE OF FAILURE TO REGISTER AND PAY SPECIAL TAX.

(a) TRAFFICKING. - - It shall be unlawful for any person required to register under the provisions of this subpart or section 4702 (a) to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away narcotic drugs without having registered and paid the special tax imposed by this subpart or section 4702 (a).

(b) TRANSPORTATION. - - Except as otherwise provided in this subsection, it shall be unlawful for any person to send, ship, carry, or deliver narcotic drugs from any State or Territory or the District of Columbia, or any insular possession of the United States, into any other State or Territory or the District of Columbia, or any insular possession of the United States. Nothing contained in this subsection shall apply - -

(1) to any person who shall have registered and paid the special tax as required by sections 4721 and 4722;
(2) to common carriers engaged in transporting narcotic drugs;

(3) to any employee acting within the scope of his employment for any person who shall have registered and paid the special tax as required by sections 4721 and 4722, or to any contract carrier or other agent acting within the scope of his agency for such registered person;

(4) to any person who shall deliver any such drug which has been prescribed or dispensed by a physician, dentist, veterinarian, or other practitioner required to register under the terms of this subpart or section 4702 (a) and employed to prescribe for the particular patient receiving such drug;

(5) to any person carrying any narcotic drug or compound of a narcotic drug which has been obtained by the person from a registered dealer in pursuance of a written or oral prescription referred to in section 4705 (c) (2), issued for legitimate medical uses by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4722, if the bottle or other container in which such drug or compound of a narcotic drug is carried bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person issuing such prescription;

(6) to any person carrying any such drug which has been obtained by the person as a patient from a registered physician, dentist, or other practitioner in the course of his professional practice if such drug is dis-

pensed to the patient for legitimate medical purposes; or

(7) to any United States, State, county, municipal, District, Territorial, or insular officer or official acting within the scope of his official duties.

(c) POSSESSION. - - It shall be unlawful for any person who has not registered and paid the special tax provided for by this subpart or section 4702 (a) to have in his possession or under his control narcotic drugs and such possession or control shall be presumptive evidence of a violation of this subsection and subsection (a), and also a violation of the provisions of sections 4721 and 4722: Provided, That this subsection shall not apply to any employee of a registered person, or to a nurse under the supervision of a physician, dentist, or veterinary surgeon registered under this subpart or section 4702 (a), having such possession or control by virtue of his employment or occupation and not on his own account; or to the possession of narcotic drugs which has or have been prescribed in good faith by a physician, dentist, or veterinary surgeon registered under this subpart or section 4702 (a) or to any United States, State, county, municipal, District, Territorial, or insular officer or official who has possession of any of said drugs, by reason of his official duties; or to a warehouseman holding possession for a person registered and who has paid the taxes under this subpart and sections 4701 to 4707, inclusive; or to common carriers engaged in transporting such drugs: Provided further, That it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other

writ or proceeding laid or brought under this subpart or sections 4701 to 4707, inclusive; and the burden of proof of any such exemption shal be upon the defendant. Aug. 16, 1954, 9:45 a.m., E.D.T., v. 736, 68A Stat. 555, amended Aug. 31, 1954, c. 1147, § 10, 68 Stat. 1004.

No. 588

Office-Supreme Court, U.S.
FILED
OCT 28 1963.
JOHN F. DAVIS, CLERK

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19797

HENRY MONROE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(July 18, 1963.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and DeVANE, District Judge.

DeVANE, District Judge: Appellant was indicted, tried and convicted on two counts of a three count indictment charging a violation of 21 USCA 174 (the Narcotic

Import Act) and 26 USCA 4724 (the Harrison Narcotic Act) relative to the possession and transportation of narcotic drugs, to-wit: 1764 capsules of heroin. After conviction, appellant was sentenced to be imprisoned twelve years on count one and ten years on count two, said sentences to run concurrently. Monroe then timely appealed his conviction to this Court.

Appellant was arrested on November 18, 1961, at the Union Passenger Terminal in New Orleans, Louisiana, shortly after he alighted from a passenger train, which had just arrived from Chicago. A search of his person which followed his arrest by Treasury Agents disclosed he was carrying in a brown paper bag a glass jar containing 1764 capsules of heroin hydro chloride. His arrest was the culmination of an investigation of his activities over a substantial period of time, i.e. from August 14, 1961, through November 16, 1961.

Following his arrest and search, appellant filed in the District Court a motion to suppress as evidence the capsules containing heroin seized from defendant by the Narcotic Agents incident to his arrest without warrant. Appellant was granted a full and fair hearing on this motion, which motion to suppress the evidence was denied. The opinion of the trial Judge relative to this motion to suppress evidence is reported in *United States v. Monroe*, (1962) 205 F. Supp. 175.

Appellant contends that inasmuch as he was under close surveillance of the Government Agents for more than sixty days that the Government Agents were fully aware

of his criminal activities long before his arrest, and for this reason they were obligated under the law to secure a warrant of arrest and a search warrant prior to his arrest.

The Narcotic Control Act of 1956, 26 USC 7601 (1957), specifically provides that agents of the Federal Bureau of Narcotics are authorized to make arrests without warrants for violations of the narcotic laws where the violations are committed in their presence or where they have reasonable grounds to believe that the person arrested is in the process of committing an offense against the laws of the United States relating to narcotic drugs. *Draper v. United States*, (1959) 358 U.S. 307; *Espinoza v. United States*, (5th Cir. 1960) 278 F.2d 802.

Rules 3, 4 and 41 of the Federal Rules of Criminal Procedure relied on by appellant, which set forth the requirements necessary for the issuance of both an arrest warrant and a search warrant, do not require the issuance of either under the facts and circumstances of this case. The questions presented to us on this appeal are so thoroughly treated and disposed of by the trial Judge who heard the motion to suppress the evidence as reported in *United States v. Monroe, supra*, it is unnecessary for this Court to labor these points any further other than to say that this Court affirms the decision of the trial Judge relative to appellant's motion to suppress the evidence.

Next, appellant insists that through cross-examination the Government obtained admissions to the effect that appellant had given an incomplete if not a false name, that he had a package of stolen heroin and that he was going to sell it if he could. Appellant contends these facts were

thoroughly irrelevant to the issue raised at the hearing of appellant's motion to suppress.

The record discloses that on direct examination appellant testified that he gave the name of "Williams" rather than his real name. He further testified that he advised the Federal Agents that the brown paper bag he was carrying was his "personal property" and that the capsules of heroin contained in the brown paper bag were stolen. All this testimony was originally solicited on direct examination by his own counsel. The cross-examination relating thereto was, therefore, thoroughly proper.

Appellant further contends that the testimony of Agent Roger Warner to the effect that the agents had reliable information that Henry Monroe was arriving in New Orleans with narcotics was hearsay and should have been excluded by the trial Court because said testimony was detrimental to the defendant's case. Appellant cites *United States v. Mont*, 306 F.2d 412. The decision in this case has no application here for the reason that the answers given by the agent in this case were solicited by appellant's own counsel which constituted "opening the door" for the answers solicited by Government counsel. Moreover, it was the obligation of appellant's counsel to object to the answers given if he thought they were objectionable and to request the Court to strike the portion containing alleged hearsay and instruct the jury accordingly. This was not done. Therefore, appellant waived his objection and the trial Court committed no error in allowing the testimony to go to the jury.

Prior to resting its case, the Government offered into

evidence as an admissions against interest the testimony given by appellant at the hearing on his motion to suppress. Appellant now contends that the admissions made by him were tantamount to a judicial confession and for that reason should not have been submitted until the Government had properly laid a predicate or foundation for its receipt in evidence.

The Court is unable to agree with appellant that the testimony given by him at the preliminary hearing on his motion to suppress amounts to a judicial confession. It is not an admission of guilt, although it is permeated with a number of damaging admissions against interest. Neither counsel for appellant or for the Government cite any decision of this Circuit with reference to the legality or the illegality of the use of such evidence and this Court is not aware of any decision of this Circuit ruling upon the admissibility of such evidence. However, the question has been decided by other Circuits supporting the receipt of such testimony in the record on the trial of the case. *Powers v. United States*, (1912) 223 U.S. 303; *Fowler v. United States*, (10th Cir. 1956) 239 F.2d 93; *Heller v. United States*, (7th Cir. 1932) 57 F.2d 627, cert. den. 286 U.S. 567; *Kaiser v. United States*, (8th Cir. 1932) 60 F.2d 410, cert. den. 287 U.S. 654.

The Court finds and holds that in accordance with the rule laid down in the cited cases this testimony was admissible.

The judgment of the District Court is

AFFIRMED.